In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1314

MARK H. KROLL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1435

WILLIAM CAHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 433 F. 2d 1282.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1970. A petition for rehearing was denied on December 10, 1970, as to petitioner Kroll and on January 6, 1971, as to petitioner Cahn. Mr.

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Justice Black extended the time for filing Kroll's petition for a writ of certiorari to February 8, 1971, and Mr. Justice Douglas extended the time for filing Cahn's petition to March 4, 1971. Kroll's petition was filed on February 5, 1971, and that of Cahn on March 4, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the sole stockholder of a bankrupt corporation has standing to contest the use of corporate records obtained with the consent of the trustee after the trustee had obtained possession and control of them.

2. Whether, in the circumstances of this conspiracy prosecution, one of the defendants was entitled to a severance from the others.

3. Whether the time which elapsed between termination of the fraudulent scheme and the return of the indictment deprived the defendants of their right to a fair and speedy trial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners and five co-defendants were convicted of conspiracy to violate 15 U.S.C. 77q(a) and 18 U.S.C. 1341, seven counts of fraud in the sale of securities in violation of 15 U.S.C. 77q(a), and four counts of mail fraud in violation of 18 U.S.C. 1341. Petitioners were each sentenced to terms of imprisonment of five years on Count 1 and five years on Count 2 to run consecutively, and five years on each of the remaining counts, to run concurrently with each other and with the sen-

tence on Count 1. Petitioner Cahn was ordered to pay a fine of $5,000 on each of three counts, making a total fine of $15,000. Petitioner Kroll was ordered to pay a fine of $5,000 on each of six counts and $10,000 on Count 15, making a total fine of $40,000. The Court of Appeals affirmed (Pet. App. 1a–18a).

The evidence at trial[1] showed that mortgages and mortgage notes were offered for sale pursuant to a promotional campaign involving false and misleading advertising as well as omissions and untrue statements of material facts (Tr. 432–434, 484–485, 715–721, 1207, 1506–1515, 1612–1613, 1715, 1900, 1977, 2043–2045, 2518, 3430). The securities were issued by American Bonding Mortgage Co., Inc. (ABM), which was owned by Kroll and supervised and run by Cahn. (Tr. 410–422, 427–435). Although ABM was insolvent from its inception, it nevertheless accepted from investors, during the approximately four years of its operation, over $9 million (Tr. 2719, 2867). These funds were used to finance large advertising, travel, entertainment and promotion expenses, the development and purchase of real estate, payment of interest to investors for whom mortgages had not yet been secured, purchase of mortgages of questionable value, and numerous personal expenses of the defendants (Tr. 817, 920, 927–928, 938–939, 1238, 1242, 2004–2005, 2365–2368, 2728, 2736, 2740, 2748, 2794–2795, 2826–2841, 2852, 2856–2860, 3183, 3629).

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[1] A further statement of the evidence appears in the brief in opposition to the petition of a third co-defendant, Adler, whose petition is pending as No. 1191 this Term.

In order to retain complete control over these transactions, ABM formed a complex network of subsidiary corporations, which were presented to the public as being independent, but which in fact were so interrelated that they operated as one business. (Tr. 427, 915–919, 1016–1018, 1140–1144, 1393–1395, 1409, 1612–1613, 1715, 1900, 2055, 2146, 2381–2382, 2399, 2419, 2518, 2773–2776, 2819–2823, 3176–3178, 3275). For example, petitioner Cahn controlled First Bonded Corp. which, like ABM, operated by purchasing mortgages with money given in trust by the investors. He also formed Aspic Investment Co., which purportedly was to find and acquire mortgages for ABM to assign to investors (Tr. 637–643; 2700–2824). And, after purchasing property at Appollo Beach, he set up Flora Sun Corporation, and sold uninsured mortgages on this vacant and unimproved land, representing that it was owner-occupied land and that the mortgages were insured (Tr. 1016–1018, 1140–1144, 1393–1395, 1409, 1575, 1612–1613, 1715, 1900, 2055, 2078, 2381–2382, 2399, 2419, 2518, 2503).

Petitioner Kroll owned Michigan Surety Co. and later Pan American Surety Co., both insolvent corporations. These companies purportedly insured the mortgages of ABM and First Bonded, but although the mortgages were continually in default, no claims were ever made against them (Tr. 1012, 1604, 1611–1612, 2188–2209, 2216, 2219–2234, 2620, 2623, 2641). A review of their books disclosed that both ABM and Aspic Investment loaned substantial sums raised from their investors to both Flora Sun and Michigan Surety without requiring collateral, without charging

interest, and, indeed, without ever being repaid (Tr. 2812–2824).

ARGUMENT

1. Petitioner Cahn lacks standing to contest evidence obtained through examination of the records of a bankrupt corporation with the consent of the trustee in bankruptcy. At the extensive hearing on his motion to suppress, which was denied by the trial court (Tr. 620–648 J), it was disclosed that ABM (of which Cahn was the sole stockholder) was petitioned into bankruptcy in December 1961, and that all of its corporate records were then placed in the custody of a receiver and later of a trustee, John Nicholas. To avoid high rent for office space, the referee in bankruptcy authorized the trustee to take possession of the corporate records and remove them to a room adjoining his office. Petitioners did not object. In November 1965, an accountant from the Securities and Exchange Commission, George M. Callahan, requested and was given permission by the trustee to examine the corporate records (Tr. 620–637). Petitioner was not notified (Tr. 639). Later, the government obtained an *ex parte* court order authorizing it to remove the records Mr. Callahan needed for his investigation from the trustee's office (Tr. 629–630); the trustee was given a receipt whenever any of the records were removed (Tr. 627). The resulting evidence was presented to the grand jury in February 1966.

Since petitioner Calm had neither title to the corporate records[2] nor a possessory interest in them,[3] he is not a person aggrieved by their examination. See *Mancusi* v. *De Forte*, 392 U.S. 364; *Alderman* v. *United States*, 394 U.S. 165. The right of a bankrupt to protest use of corporate records as evidence against him ceases as soon as possession and control over them pass from him to the receiver and the court. *Dier* v. *Banton*, 262 U.S. 147, 149–150; *Ex Parte Fuller*, 262 U.S. 91; see *United States* v. *Hopps*, 331 F. 2d 332, 341 (C.A. 4), certiorari denied, 379 U.S. 820. As an officer of the court and a representative of the creditors, the trustee had both full power to manage the affairs of the bankrupt estate (11 U.S.C. 11(a)(5), 75, 110) and the duty to report to the government any possible criminal violations of the bankruptcy act (18 U.S.C. 3057).[4]

2. Petitioner Kroll was not entitled to a severance from the other defendants. As the trial involved a charge of conspiracy with evidence of joint participation of the petitioner and his co-defendants in the various frauds, a joint trial was proper to avoid several lengthy trials presenting the same evidence. *Opper* v. *United States*, 348 U.S. 84, 95; *Stilson* v. *United*

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[2] *Bisno* v. *United States*, 299 F. 2d 711, 717–718 (C.A. 9), certiorari denied, 370 U.S. 952. See also *United States* v. *Masterson*, 383 F. 2d 610, 613–614 (C.A. 2), certiorari denied, 390 U.S. 954.

[3] *Elbelt* v. *United States*, 364 F. 2d 127, 136–138 (C.A. 10), certiorari denied, 385 U.S. 1014.

[4] Calm's petition also incorporates by reference the question presented in No. 1191, which we discuss in our response to that petition, and the second question in Kroll's petition, which we discuss, *infra*, pp. 7–8.

States, 250 U.S. 583, 585–586; Pet App. 8a. In order to avoid prejudice, the trial court ruled that the co-defendants, and any other witness defense counsel named, be asked in camera whether they were willing to testify or were going to invoke the privilege against self-incrimination (Tr. 280). Since there is no showing of prejudice in this case, the district court's ruling should not be reversed. *Schaffer* v. *United States*, 362 U.S. 511.

Petitioner Kroll's claim of prejudice is that his co-defendants Cahn and Criswell, who had made exculpatory statements in the bankruptcy proceedings as to Kroll's role in ABM, could not be required to testify as witnesses in the joint trial. In fact, however, both Cahn and Criswell took the stand in their own behalf; each testified, as they had at the bankruptcy proceedings, that petitioner Kroll did not control or dominate the operations of ABM (Tr. 3168, 3458). Although they had declined to testify as witnesses for Kroll as such (Tr. 2945, 2947), their subsequent testimony necessarily had the same effect as if they had done so.

3. Petitioner Kroll also contends that he was deprived of a fair and speedy trial by a delay of more than four years between the termination of the scheme in December 1961, and the return of the indictment in February 1966. The relationship between pre-indictment delay and speedy trial or due process claims is already before the Court in *United States* v. *Marion*, No. 810, probable jurisdiction noted, March 1, 1971. However, whether that issue depends upon the circumstances—such as the length of the delay, the reasons for it and the reasonable possibility of preju-

dice—or is controlled, as the Fifth Circuit holds,[5] solely by the applicable statute of limitations, reversal would be inappropriate here. The statute of limitations is five years in this case; and there was no undue delay by any test. The complex fraud which the defendants had created could not be unraveled in short order. The record shows, and the court of appeals found in the alternative (Pet. App. 6a), that the delay caused no prejudice. No material records were missing, and the witnesses' recollection remained generally clear. In these circumstances, we believe the Court need not withhold action on these petitions.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petitions for writs of certiorari should be denied.

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APRIL 1971.

[5] See *United States* v. *Grayson*, 416 F. 2d 1073 (C.A. 5), certiorari denied, 396 U.S. 1059; *Harlow* v. *United States*, 301 F. 2d 361 (C.A. 5), certiorari denied, 371 U.S. 814. Compare the jurisdictional statement for the United States in *Marion*, *supra*, at pp. 5-7.

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